TVI, Inc. d/b/a Savers *and* General Sales Drivers, Delivery Drivers & Helpers, Local 14, affiliated with International Brotherhood of Teamsters, AFL–CIO. Case 28–CA–16019–2

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN, COWEN, AND BARTLETT

On September 18, 2000, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge that Supervisor Terri Foster's statement to employees at the Respondent's Rancho store did not violate Section 8(a)(1), but rather was a lawful prediction of potential consequences of unionization under the standard set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Under *Gissel*, when an employer makes a prediction as to what effects unionization may have on its company, such a prediction is lawful where it is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." *NLRB v. Gissel Packing Co.*, 395 U.S. at 618. Here, we find that under *Gissel* Foster's statement was both "carefully phrased" and based upon "objective fact."

In response to employee questions, Foster, who knew that the store was losing money at the time, stated that "if the union ever did come in, the store wasn't making enough money to . . . pay off higher wages, and it would be a possibility that everybody would lose their job." Foster based her statement on what the store manager told her. Foster also proceeded to back up her statement by showing employees a document that illustrated what the store was making per day. The fact that the document was not introduced into evidence does not contradict the fact that it was shown to employees as support for Foster's prediction. Further, the Respondent's financial records indicate that the Rancho store was not profitable at the time.

Contrary to our dissenting colleague, Foster's statement was thus not mere speculation on her part. Further, contrary to the dissent, the prediction was not based on "after the fact evidence."

The dissent says that Foster had no knowledge of the Respondent's *overall* financial situation. But that is irrelevant to Foster's prediction, inasmuch as her prediction was simply that *the particular store* might have to close if wages were excessive.

In sum, employees would reasonably view Foster's remark as indicating that any store closure would be economically driven rather than retaliatory.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, dissenting in part.

The evidence here shows that Supervisor Terri Foster's statement—that all employees could lose their jobs as a result of unionization—was based solely on hearsay and conjecture. This is precisely the type of speculation that the Supreme Court found to be coercive in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Unlike my colleagues, then, I would find that Foster unlawfully threatened job loss in violation of Section 8(a)(1) of the Act.

During the Union's organizing campaign at the Respondent's Rancho store in August 1999, Foster told employees that the store was not making enough money to support higher wages, and that if the Union came in there was a possibility that everyone would lose their jobs. Foster testified that her prediction was based on a single comment about the store's profits made to her by the store's manager.[1] There is no evidence that Foster, a low-level supervisor who had been working at the Rancho store for only a month, had any firsthand knowledge of the store's finances. Indeed, Foster conceded that she "wasn't real sure about . . . how much the store was making at that point," but that she "just [knew] that [her] manager had stated once that [the store] had only profited once at that point, so [she] knew the store wasn't making much money."

Under *Gissel*, it is the Respondent's burden to show that Foster's statement was justified by objective evidence. See, e.g., *Schaumburg Hyundai*, 318 NLRB 449,

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[1] The judge credited the testimony of employee Diana Hernandez over that of Foster concerning what Foster told employees, but credited Foster's testimony that whatever she told employees that day was based on the prior remarks of the store manager. The store manager did not testify.

450 (1995); *see also Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1137 (7th Cir. 1974) (finding that *Gissel* places a "severe burden" on employers seeking to justify predictions concerning the consequences of unionization). *Gissel* requires more than a mere belief to make such a prediction lawful, because "employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts." *Gissel*, 395 U.S. at 619–620. *See also Turner Shoe Co.*, 249 NLRB 144, 146 (1980).

Here, the Respondent offered only a summary statement of the store's finances for the relevant period, but failed to show that the summary was contemporaneously available when Foster made her statements to the employees. Reliance on "after the fact" evidence produced at trial is insufficient to sustain the Respondent's burden. *See Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1342 (2000).

Foster apparently did show employees a piece of paper allegedly showing what the store was making per day. It is impossible, however, to determine whether the paper actually provided support for Foster's statement, because the Respondent failed to offer it into evidence. The only evidence in the record concerning the paper was the testimony of Diana Hernandez, a witness for the General Counsel, who stated that after Foster made her prediction, "she went upstairs and brought down a . . . piece of paper showing how much the store was making a day." Significantly, when Foster was asked whether she shared with employees any information about the store's profits, she made no mention of the paper, but referred only to what she had heard from the store's manager. Surely, then, any simple display of this piece of paper, by itself, hardly demonstrates that Foster's prediction was based upon objective facts.

Nor does the record show that Foster knew how to properly interpret whatever information may have been contained in the paper. The Rancho store is only one of several operated by the Respondent in the Nevada area, and there is no evidence that Foster had any knowledge concerning the Respondent's overall financial situation. Further, there is no evidence that Foster knew what union wage demands might be, or that she considered the give-and-take of collective bargaining when she predicted the impact of unionization on the Respondent. *See Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB at 1341. In short, the record evidence is that Foster's prediction rested entirely on her own speculation about what might happen if the employees unionized.

Finally, I take issue with the judge's suggestion that a "single incident . . . by a minor supervisor" cannot be the basis for finding a violation under *Gissel*. By dismissing a threat of job loss on the basis that it was merely a "single incident," the majority ignores *Gissel's* admonition that employees are "particularly sensitive" to such hints of plant closing. Likewise, that Foster might have been a low-level supervisor does not lessen the impact of the threat of store closure on employees. Particularly since she attempted to use a "piece of paper" from "upstairs" to back up her position, her comments would seem to carry a weight of authority.

For all of these reasons, I would reverse the judge and find that the Foster's statements violated Section 8(a)(1) as alleged.

Benjamin W. Green, Esq., for the General Counsel.
James T. Winkler, Esq., for the Respondent.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent has violated Section 8(a)(1) of the National Labor Relations Act (Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the Government's brief and the Respondent's oral argument, I make the following findings of fact.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent operates four retail stores in the Las Vegas, Nevada area. These stores are referred to as Charleston, Rancho, Spring Mountain, and Tropicana. In the summer of 1999 the Union was engaged in an organizing campaign at the stores. An election, based on the Union's representation petition, was held on October 1, 1999. The Union lost the election, and no objections were filed.

III. UNFAIR LABOR PRACTICE ALLEGATIONS

A. August 25—Prediction of Job Loss

On approximately August 25, 1999, at the Rancho store, assistant production supervisor, Terri Foster, and several employees were talking. Foster testified that she had difficulty recalling what was said, but did remember employee Donna Wilson saying the Respondent could afford to pay the employees more. Foster testified that she responded:

> Well, the store has been open for less than a year, and . . . I think we've only profited once, if that." Because I remember my manager stating that I think we had profited once at that time, and . . . where would the money come from? I mean, if

[1] This case was heard at Las Vegas, Nevada, on June 13, 2000. All dates in this decision refer to events occurring in 1999 unless otherwise noted.

[2] 29 U.S.C. § 158 (a)(1).

> we haven't profited, we wouldn't have the kind of money to give out raises, and that if we did, we might eventually go out of business.

The Respondent introduced its exhibit 1 as evidence of the poor financial condition of the Rancho store at the time.

Employee Diana Hernandez testified that on August 25 she and several fellow employees were asking Foster questions about wages. Hernandez recalled that Foster said, "if the union ever did come in, the store wasn't making enough money to . . . pay off higher wages, and it would be a possibility that everybody would lose their job. And then she went upstairs and brought down a paper, a piece of paper showing how much the store was making per day." None of the other employees present for this conversation testified at the hearing.

The Government alleges that Foster's comments were an unlawful threat of the probable closure of the store if the employees selected the Union to represent them. Whether a statement constitutes a threat in violation of the Act is based on whether the statement, in context, tends to coerce or intimidate a reasonable employee. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). However, a prediction based on objective fact that conveys the employer's belief as to the probable consequences beyond the employer's control, is not considered coercive. Id. at 618; *Metallite Corp.*, 308 NLRB 266 (1992).

Foster's recollection of the conversation was admittedly clouded. Considering the demeanor of the two witnesses, I find that Hernandez' recollection of what Foster said is the most accurate recital of what the employees were told. According to that testimony, Foster, in response to an employee's inquiry about receiving higher wages, told the employees that the store was not making enough money to support higher wages. She concluded that if the union came in demanding higher wages it would be a "possibility" that employees would lose employment. Foster based her prediction upon what she had been told by her manager about the store's financial condition. Foster backed up her prediction by showing employees what the store was making a day. The Respondent's financial records show the store was not profitable at the time. I find that Foster's statement, in the context of the discussion, was her prediction, based on objective fact, of her belief of demonstrably probable consequences beyond the Respondent's control. I find that this single incident of an alleged unlawful prediction by a minor supervisor was not of such a nature as to violate Section 8(a)(1) of the Act. *NLRB v. Gissel*, supra; *Reeves Bros.*, 320 NLRB 1082, 1083 (1996).

B. September 11—Tropicana Store Incident

On September 11 Patty Green, Diana Hernandez, Katie McKinney, and Erin McAloon went to two of the Respondent's stores wearing union T-shirts. Green, Hernandez, and McKinney are employees of the Respondent (although they were not employed at either store they visited.) McAloon is McKinney's daughter and is not employed by the Respondent.

The four women first went to the Spring Mountain store where they shopped briefly and then left. They next went to the Respondent's Tropicana store. They were observed when they arrived by employee Rosalie Cummings. She went upstairs to where production supervisor, Maria Luna, has her office and reported the union supporter's presence to her. Luna looked out the window of her office and saw the union supporters on the store floor. The union supporters stayed in the store for a short while and then went to their car in the parking lot. Employees Cummings and Tammi Jo Galagowitsch, along with Luna, went outside and watched the women get in their car. When the union supporters exited the parking lot they drove by the front of the store where Luna, Galagowitsch and Cummings were standing.

Luna testified that when the union supporters left the store she and Galagowitsch decided to go outside, "because it was kind of something—it was new for us. . . . So we decided to go out and have a cigarette." Luna observed the union supporters drive by the front of the store. Luna saw one of the women, who was seated in the back of the car, "flip her off." She recognized the woman as Diana Hernandez. The car windows were down and she heard a loud comment from the car, "Fuck you." Galagowitsch said to her, "You saw what they did and you heard what they said." Luna then said they should all go back inside the store.

Employee Tammi Jo Galagowitsch testified that as the women drove by them, Luna said to her, "Oh, somebody just flipped me off." Galagowitsch turned around and saw one of the women in the car had their middle finger up at them.

Rosalie Cummings testified that before the union supporters left the store she saw two of them point up to the office window, and one of them said, " 'You know how she is' and called her a bitch." (Presumably referring to Luna, whose office they had pointed out.) Cummings then recalled the union supporters exiting the store and driving away. As they drove by the store she was standing just outside the store door and observed the union supporters, "flip us the bird and yell out "bitch" again." One of the women in the back seat gave them the finger.

Green, Hernandez, McKinney, and McAloon all testified to the effect that none of them made obscene gestures or profane comments while at the Tropicana store. They conceded they did wave goodbye to the people standing outside the store as they left. Based on the demeanor of the witnesses I credit the testimony of Luna, Galagowitsch and Cummings that some of the union supporters did make profane comments and obscene gestures directed at them as they described.

The Government alleges that Luna's observation of the union supporters was unlawful surveillance of their union activities under the Act. The Respondent argues that Luna was doing no more than casually observing the women's activity at one of its own stores.

The four women went to the stores manifesting their endorsement of the Union by wearing union T-shirts. Luna observed them from her office window for some unknown period of time. She, as well as two employees, then briefly watched them drive away from the store. Luna did not take notes or otherwise record her observations. The union supporters testified that they affably exchanged waves with Luna as they drove away. I find that Luna's relative casual observation of the union supporters does not rise to unlawful surveillance of their union activity as contemplated by the Act. The record does not reflect that Luna continuously watched them while they were in the store, nor did she record their activities. The record makes clear

that the union supporters were not in the store for the purpose of concealing their advocacy on behalf of the Union. I find that the Respondent did not violate Section 8(a)(1) of the Act by Luna's short observation of the union supporters while they were at its public facility. *Key Food Stores*, 286 NLRB 1056 (1987).

C. September 14 - Employee Meetings

Employee Patty Green testified that on September 14 she was working across the hall from the break room at her store. Respondent's agent, Lupe Cruz, a labor consultant, was holding an employee meeting in the break room. Green testified that she could hear what Cruz was saying in that meeting. She recalled hearing him state that some employees from the Rancho and the Charleston stores had gone to the Tropicana store and were disruptive. When they were politely asked to leave, they were yelling obscenities and flipping everybody off.

Kathryn McKinney testified that on September 14 she attended an employee meeting at work held by Cruz. According to McKinney, Cruz told the assemblage that, "To show you the mentality of the people who are leading you in this attempt, a group of them, one from this store and two from the Rancho store, went shopping this weekend wearing hats and buttons and T-shirts and approaching the people and cursing and using obscene gestures and creating such a ruckus that they were asked to leave."

Employee Helen Hicks attended a meeting conducted by Cruz at the Rancho store on September 14. She recalled that he said during the meeting that certain individuals had gone into a Tropicana store wearing their union T-shirts, causing a disturbance and uttering profanities and giving somebody an obscene gesture. Cruz did not testify at the hearing.

The Government alleges that Cruz' remarks concerning the union supporters appearance at the Respondent's stores unlawfully created the impression of surveillance of their union activity. An employer creates an unlawful impression of surveillance by remarks that would reasonably lead employees to assume that their activities were under surveillance or that it has sources of information about their activities. *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000); *Lucky 7 Limousine*, 312 NLRB 770, 771 (1993); *Flexsteel Industries*, 311 NLRB 257 (1993); *United Charter Service*, 306 NLRB 150, 151 (1992). The test of whether an employer's remarks or actions violated Section 8(a)(1)'s prohibition against interference, restraint or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995). Cruz' remarks were focused on the alleged misconduct of the union supporters. Two of the witnesses recalled he only mentioned their appearance at the Tropicana store. I do not find that Cruz' comments regarding the single incident at a public location reasonably conveyed to employees that their union activities were somehow under unlawful scrutiny. I find that the Respondent did not violate Section 8(a)(1) of the Act by anything that Cruz said to employees on September 14. *General Fabrications Corp.*, 328 NLRB 1114, 1124 (1999).

D. September 17 – Hemenway's Discussion with Employees

Respondent's District Manager, Russ Hemenway, testified that he was made aware of what had occurred at the Tropicana store later in the day on September 11. The following Monday he talked to Galagowitsch and Luna about what had happened. They reported to him what they observed, as set forth above.

On September 17 Hemenway went to the Charleston store and discussed the matter with McKinney. Laura Sheldon, Respondent's Human Resources Regional Manager, was also present during the conversation. McKinney testified that Hemenway said that he wanted to talk to her about what had happened at the Tropicana store the previous Saturday. McKinney said, "What happened, Russ? …Nothing happened, Russ. Absolutely nothing happened." (McKinney testified she had heard "fictitious" stories of what allegedly had happened at the Tropicana store before this conversation.) Hemenway said that he knew she had been at the store and he was referring to what happened, "[O]utside the store." McKinney testified she stated, " 'What happened outside the store?' I said, . . . 'Nothing happened. We got in the car, we drove past the main entrance, and Maria was out there with employees. They waved, we waved. That was it.'" Hemenway told her that he understood there were some obscene gestures. McKinney denied this and said there was no foul language either. Hemenway said that he just wanted to make sure there was "not a repeat performance." McKinney questioned, "Repeat performance? You mean I can't shop at the Savers store?" She recalled he replied, "No, no. You're allowed to shop at the Savers store, but until this thing is settled, I'd just as soon that you didn't."

Hemenway testified that he specifically told McKinney that it was all right to shop at the stores. He testified that he had previously been coached by Respondent's human relations person that it was okay for the union supporters to come into the stores with any of their union material. Hemenway denied that he told McKinney he would rather she delay shopping at the stores until the union matter was resolved. He recalled McKinney's denial of any incident at the Tropicana store and he replied, "Okay. Well, if nothing happened, we really don't have a problem. But all I'm saying is, I don't want any altercations, you know, outside the stores." Sheldon's testimony corroborated Hemenway's version of what was said. Considering the demeanor of the respective witnesses and the record as a whole, I find that Hemenway did not tell McKinney that she should not shop at Respondent's stores. I further find that nothing Hemenway said to McKinney "threatened employees with unspecified reprisals" as alleged in the complaint.

Hemenway and Sheldon also went to the Rancho store and spoke with Green and Hernandez. Green testified that Hemenway said that, "he did not want to hear any more incidents like the one that happened at the Tropicana store the previous weekend." Green said, "Oh, we can't smile and wave?" Hemenway replied that he thought it was more than that. Green told him, "No. We went in, we shopped, we left. We smiled and waved, they smiled and waved back, and that was it." Diana Hernandez recalled that Hemenway said he did not want a repeat of what happened at the Tropicana store. She told him that nothing had really happened for there to be a repeat and that ended the conversation.

Hemenway testified similarly as to what was said. He recalled telling the two women that they were, "more than welcome to come in the stores, but I didn't want another episode like had happened out in front of the Tropicana store." Both women denied that anything untoward had occurred. Hemenway then told them that if nothing happened then there was no problem. Laura Sheldon testified likewise about what was said. She recalled that the discussion centered on the fact that it was not an issue about shopping as the employees were free to shop at the stores. Rather, based on the reports of misbehavior as the employees were leaving the store, the Respondent did not want such conduct to occur. None of the employees involved in the Tropicana store incident were disciplined or otherwise suffered any repercussions because of the incident. To the extent that there is any discrepancy between the witnesses as to what Hemenway said in this second encounter, I credit Hemenway's testimony, based on demeanor, of what he told the employees.

The Government alleges that Hemenway statements to McKinney, Hernandez and Green violated the Act because he prohibited employees from shopping at Respondent's stores and because he threatened employees with unspecified reprisals. Hemenway's remarks to the union supporters were based on his concern that they had abused fellow employees by their conduct on September 11 at the Tropicana store. He did not address the employees' union activity or their visit to the Spring Mountain store. His statements concerned what they allegedly said and did outside the Tropicana store in relation to Luna and the employees working there. Hemenway communicated the Respondent's concern that nothing abusive should take place regarding the store's employees and supervision. The women involved denied anything had happened, Hemenway said that in that case there was no problem and that ended the matter. I find that Hemenway's statements to the union supporters did not reasonably tend to threaten, restrain or coerce them in the conduct of their union activities and that nothing he said to the three women violated Section 8(a)(1) of the Act. *St. Luke's Episcopal-Presbyterian Hospital*, 331 NLRB 761, 761–762 (2000).

CONCLUSIONS OF LAW

1. TVI, Inc. d/b/a Savers, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The General Sales Drivers, Delivery Drivers & Helpers, Local 14, affiliated with International Brotherhood of Teamsters, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[3]

ORDER

IT IS ORDERED that the complaint be dismissed in its entirety.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.